1960

Arnold Machinery Co., Inc. v. Intrusion Prepakt Inc. : Brief of Plaintiff and Appellant

Utah Supreme Court

Case No. 9292

IN THE SUPREME COURT
of the
STATE OF UTAH

ARNOLD MACHINERY COMPANY, INC., a corporation,

Plaintiff and Appellant,

—vs.—

INTRUSION PREPAKT INC., a corporation,

Defendant and Respondent.

BRIEF OF PLAINTIFF AND APPELLANT

STEPHENS, BRAYTON & LOWE, John W. Lowe

Attorneys for Plaintiff and Appellant

1001 Walker Bank Building
Salt Lake City, Utah

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STATEMENT OF FACTS

Plaintiff Arnold Machinery Company is a Utah corporation engaged in the equipment sales and rental business in Salt Lake City, with a branch office in Idaho Falls. Defendant Intrusion Prepakt Inc., is a Delaware corporation engaged in the construction business.

On July 9, 1958, plaintiff and defendant entered into a written lease whereby plaintiff rented to defendant a large compressor (Tr. 2) having an agreed value of

$13,000.00, (Ex. 1) for use by the defendant on a construction job near Ashton, Idaho. Delivery was made and defendant used the compressor which worked perfectly from the time of delivery on July 10 until July 24. (Tr. 87, 97, 100, Ex. 9). No complaint was made by Defendant to Plaintiff until July 24 (Tr. 87).

On Thursday, July 24, while defendant was using the compressor on the job, it overheated and stopped operating. Defendant called plaintiff in Idaho Falls informing plaintiff that without compressed air defendant's job was shut down and demanded that plaintiff get the machine operating by the next Monday (Tr. 5). Despite the fact that July 24 was a holiday and despite the fact that the work had to be done on the holiday and over the week-end, plaintiff's Idaho Falls men went to Ashton to see if they could fix the compressor. Upon examination they found that major parts of the compresor had been burned out because of overheating and towed the compressor back to Idaho Falls. Plaintiff's mechanic in Idaho Falls then ascertained that the compressor could not be fixed without new parts which were not available for installation by Monday and so ordered a new unit from the Salt Lake office for installation in the compressor, so that Defendants work would not be delayed (Tr. 5). This was shipped immediately and was installed in the compressor, and the compressor was then delivered back to defendant at Ashton in time for defendant's work on Monday (Tr. 5). The burned out unit was shipped to the Salt Lake office where is was found that the cause of the overheating was the inter-

ruption of the flow of oil through the compressor with a resultant lack of lubrication. The oil flow had been interrupted because of a brass cutting which somehow had gotten into the oil (Tr. 51, 63). When this was ascertained, plaintiff's Salt Lake office asked the Idaho Falls branch to flush the oil from the machine to eliminate the possibility that other cuttings might be in the oil and might damage the machine. This was done (Tr. 7). At the request of defendant, certain other minor adjustments were made (Tr. 7) and the compressor was then used by defendant until September 20, 1958 with no further incident.

Plaintiff proceeded to repair the burned out portion of the compressor in its Salt Lake shops (Tr. 47-81). When the repairs were completed plaintiff demanded payment for work done, parts and materials furnished and expenses incident to said repairs and replacement such as telephone calls, towing, freight, etc., basing its claim therefor upon the following terms of the Lease:

> "5. . . . lessee agrees to maintain said machinery and equipment in the same condition as when delivered to it by the lessor, usual wear and tear excepted and to pay all claims and damages arising from defects therein, or from the use or handling of said machinery and equipment, whether from injuries to the person or property, and to pay for all damages to the equipment, except the usual and ordinary wear and tear, during the life of this contract, and to return said property in as good condition as when received . . . usual and ordinary wear and tear excepted."

"6. The receipt and acceptance by the lessee of said equipment shall constitute acknowledgment that said property has been accepted and found in good, safe and serviceable condition, and fit for use, unless the lessee makes claim to the contrary to the lessor by registered mail with returned receipt demanded, addressed to the lessor's home office within three days after receipt of said equipment."

"10. In the event of accident to, or breakage of, any part of the equipment lessee may have the same repaired by any competent person, firm or corporation at its own expense or, upon notice to the lessor as to such breakage or accident, the lessor may repair said machinery for the lessee, using reasonable diligence to make said repairs or replacement in the shortest possible time, and the lessee agrees to pay the lessor its regular charges for any material or labor furnished in making said repairs upon demand; in the event any work is done outside of lessor's regular hours, including work necessary by wear and tear, by reason of which lessor shall be required to pay double time or other overtime charges to its employees, or to any one doing the work for lessee, all such charges will be paid by the lessee to the lessor."

"14. The lessee agrees to pay the lessor for all loss and damages occasioned by fire, theft, flood, accident, explosion, wreck, an act of God or any other causes that may occur during the life of this lease, and until such machinery has been returned into the posession of the lessor and accepted by it." (Ex. 1)

The damage was not due to usual and ordinary

wear and tear according to the testimony of the mechanics (Tr. 52, 64). In the opinion of all persons testifying on the matter, the work was necessary and all charges were reasonable in amount. The charges for repair, material and parts were the regular charges made by plaintiff for such labor, material and parts and the charges made for expenses incurred were the actual amounts paid by plaintiff therefor. (Tr. 12-19, 80, 81, 83, 88).

Despite the terms and provisions of the lease, defendant refused to make any payment.

At the close of all of the evidence, plaintiff moved for a directed verdict in its favor both on the question of liability and on the question of the amount to be awarded (Tr. 104). This motion was taken under advisement and the matter submitted to the jury (Tr. 104). The jury deliberated for a while and then asked for further instructions, wanting to know how much the repairs cost plaintiff. The court, despite Plaintiff's objection, instructed the jury that even though there was no evidence on the point the jury under the evidence before it had the right to bring in a verdict awarding Plaintiff any amount the jury deemed proper (Tr. 113). The jury then promptly brought in a verdict for $2500.00 instead of the $3580.52 sought by plaintiff's complaint.

The court entered judgment on the verdict which judgment included interest at the legal rate on the amount of the verdict pursuant to oral stipulation between counsel that the court might add to any verdict

interest thereon at the legal rate.

The court subsequently refused to grant a motion by plaintiff for a judgment notwithstanding the verdict, said judgment to be in the full amount sought.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR A DIRECTED VERDICT IN THE AMOUNT PRAYED.

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR A DIRECTED VERDICT IN THE AMOUNT PRAYED.

All the evidence was uncontradicted on the following points: The compressor was furnished pursuant to the written lease (Tr. 3). The lease provided that the cost of repairs except those necessitated by fair wear and tear should be borne by defendant (Ex. 1). The breakdown of the machine was not the result of fair wear and tear (Tr. 52, 64). The work done by plaintiff was necessary in order to repair the compressor, and the charges made by plaintiff were reasonable in amount and were the usual charges made by plaintiff for such work. (Tr. 12-19, 80, 81, 83, 88).

The fact that the court failed to direct the verdict on the matter of liability was not prejudicial inasmuch as the jury did find in favor of plaintiff, but the failure

of the court to direct as to the amount of liability was prejudicial.

Plaintiff had as witnesses all persons who had worked on the compressor both in Idaho and in Utah and each one gave his account of that portion of the work done by him. Their testimony was not impeached. The only ones testifying as to the nature of the repairs and charges made therefor were these witnesses of plaintiff. Defendant did not even attempt to show that the charges were excessive or unreasonable nor that they weren't the usual charges made by plaintiff or by anyone else in the business. Yet, the court not only submitted the question of the amount of the award to the jury but even encouraged the jury to bring in a compromise verdict by its comments to the jury when asked for further instruction (Tr. 113). Because of the jury's request for information as to the *cost* of repairs to plaintiff, it is obvious that the jury wanted to award plaintiff a sum which would not include any legitimate profit made by plaintiff on the repair job despite the fact that the contract provided that such a profit should not be excluded. In paragraph 10 of the Lease, it is provided:

> "The lessee agrees to pay the lessor its regular charges for any material or labor furnished." (Ex. 1)

The only evidence offered by defendant after plaintiff finished its prima facie case was defendant's job superintendent's testimony as to how the machine was

used by it and how it stopped working. Defendant's only witness said nothing as to repairs (Tr. 95-102).

It is the duty of the lower court to direct a verdict in the situation presented here where all the evidence is in plaintiff's favor.

Moore, in discussing the Federal practice, which Utah should follow, says:

> "Where no evidence is adduced to disprove the prima facie case of the plaintiff and his evidence stands uncontradicted and unimpeached, the court should direct." 5 *Moore's Federal Practice,* 2314, Note 7.

In *Cannan v. Curkeet,* 86 F.2d 573, the court said:

> "It is elementary that, in Federal courts, where undisputed evidence demands a verdict in favor of one of the parties, it is the duty of the judge to direct it."

In *Brandon v. Holman,* 41 F.2d 586, a bank cashier, according to the undisputed testimony, improperly paid out money for his own gain. In affirming a verdict for the plaintiff the court said:

> "The verdict should be directed when the evidence . . . with all inferences that the jury could draw from it, leads to but one conclusion."

In *Colthurst v. Lake View State Bank,* 18 F.2d 875, in a suit on a note, where the only evidence was to the effect that plaintiff was a holder in due course without notice, a directed verdict for the plaintiff was affirmed. The court said that defendant does not have the right

"to have a jury pass upon his claim" nor does "credibility of an uncontradicted and unimpeached witness in all cases" present a jury question.

In *Campagnie Generale Transatlantique v. American Tobacco Co.,* 31 F.2d 663, in affirming a directed verdict for the plaintiff, the court said:

> "When the plaintiff in error failed to make answer to the prima facie evidence offered . . . it was the duty of the court below to direct the verdict."

In *First National Bank & Trust Company of Muskogee v. Heilman,* 62 F.2d 157, in a suit on a note, where the only evidence was to the effect that plaintiff was a holder in due course without notice, a directed verdict for the plaintiff was denied by the lower court. This was reversed. The court said:

> "There are two classes of cases in which the trial court should direct a verdict at the close of the evidence (1) cases in which the evidence is undisputed and (2) cases in which the evidence is conflicting but is of so conclusive a character that the court in the exercise of a sound judicial discretion ought to set aside a verdict in opposition thereto. . . . The rule applies notwithstanding the party introducing the evidence has the burden of proof. . . . The instant case clearly falls within the first class and the trial court erred in not directing a verdict in favor of the bank."

53 *Am. Jur.* Trials.

> "359. Undisputed Facts Supporting One

Conclusion. — The presence or absence of conflicting testimony in a case is a consideration by which the courts are governed in directing verdicts. Where the material issues or controlling facts are conceded, or the proof offered to establish them is undisputed, uncontradicted, or uncontroverted, or such facts are conclusively established or established beyond dispute, or the evidence is all one way, and is unconflicting and uncontradictory, and only one legitmate inference may be drawn, and there are no circumstances which tend to impair or impeach it, and it is not susceptible of inherent weaknesses, improbabilities, and incongruities which in and of themselves naturally arise to contradict or impeach the weight and credibility of the utterances of the witnesses, the only question being one of law, the court may, should, and must, direct a verdict.

"361. Uncontradicted Oral Testimony—While it is the province of the jury to determine not only the weight and sufficiency of the evidence, but the credibility of the witnesses who testify, this rule is not to be taken as necessarily requiring the trial court to overrule a motion for a directed verdict and submit a case to the jury in order to permit the jury to pass upon the credibility of a witness whose testimony is unimpeached and uncontradicted, and reasonably susceptible to but one conclusion — the more generally approved rule is that it is not only permissable, but proper, for a trial court to direct, upon unimpeached oral testimony given in behalf of the party having the burden of proof, where such testimony is direct, positive, and unequivocal, is not contradicted either directly or indirectly, and is not susceptible of inherent weakness, improbabili-

ty, or incredibility. This principle underlies the great majority of the cases cited in the preceding sections which recognize it to be not only within the power, but the duty, of the court to direct verdicts when undisputed facts support only one conclusion, or where a contrary verdict would have no support in the evidence.

"386. When Verdict May Be Directed. — Again, the plaintiff is entitled to a direction in his favor where the right to recover is overwhelmingly shown, where the plaintiff's evidence is sufficient to warrant a verdict in his favor and no evidence has been adduced by the defendant appreciably tending to overthrow the case made by the plaintiff."

"Where there is no evidence, direct or circumstantial, tending to impeach the witness upon whose testimony an issue is based, the court should give mandatory instruction." *Citizens Trust & Sav. Bank v. Stackhouse,* 91 SC 455, 74 SE 977, 40 LRA (NS) 454.

"Where the plaintiff's evidence makes a prima facie case, and the defendant offers no evidence, the court should, on motion, direct a verdict for the plaintiff." *Mason v. Sault,* 93 Vt. 412, 108 A. 267, 18 ALR 1426.

"It is fundamental that where there is no evidence upon a material part of the plaintiff's claim, it is the court's duty to direct a verdict. In deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor. *Jackson v. Colston,* 116 Utah 295, 209 P.2d 566. The inquiry, then, must be di-

> rected toward whether reasonable minds could disagree in this case on the evidence presented so as to provide a question for the jury." *Boskovich v. Utah Const. Co.,* 123 U. 387, 259 P.2d 885, 886.
>
> "The credibility, sufficiency, and weight of the evidence on a given subject are for the jury; the question whether there is any evidence on the subject is for the court. Where the testimony is all one way, uncontradicted by any testimony given in the case, either from a party's own witnesses or the other side, either in direct or cross-examination, or by any facts or circumstances in the case, and is not in itsef in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or the defendant, the duty rests upon the court to direct a verdict." *Boudeman v. Arnold,* 200 Mich. 162, 166 NW 985, 8 ALR 789.

The court should not let the jury bring in any amount it desires in disregard of the evidence. The lower court sustained an objection to testimony upon the point of how much an item cost the plaintiff as distinguished from what its regular charge was, (Tr. 32) and then turned around and allowed the jury to speculate on that very point, even instructing the jury that it may disregard the evidence before it and bring in any portion of the repair bill it desired (Tr. 113). Such is not the concept of "jury trial" as set out by the above authorities.

The jury should not be allowed to apply its own concept of what the law should be, in a case involving

the construction of a written contract, where the facts are undisputed. The construction of the written contract and the application thereof to the undisputed facts was the province of the court and not the jury. The annotation at 65 A.L.R. 648, 650, cites many cases to the effect that the interpretation or construction of a written contract is a question of law for the court. The annotation states:

> "The following quotation from O'Connor v. West Sacramento Co. (1922) 189 Cal. 7, 207 Pac. 527, embodies what may be fairly regarded as the position taken in the cases in which the courts consciously regard the line which separates the functon of the court from that of the jury, though naturally there is considerable variation even among such cases in formal statement of the principle: 'The construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and the jury can only assist the court by determining disputed questions of fact. If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury and the court must direct a verdict in accordance with the construction placed on the contract by the court, in the light of the admitted circumstances. . . .'"

There is no evidence upon which the jury could justifiably reduce the claim of $3,580.52, which was fully supported by the evidence, to the round figure of $2,500.00.

CONCLUSION

Prejudicial error was made which can be corrected by the Supreme Court without the necessity of a new trial by ruling that the lower court should have directed a verdict in plaintff's favor in the sum of $3,580.52 as prayed, together with interest thereon from September 12, 1958, the date the statement of plaintiff became due and payable.

Respectfully submitted,

STEPHENS, BRAYTON &
LOWE, John W. Lowe

Attorneys for Plaintiff and Appellant

1001 Walker Bank Building
Salt Lake City, Utah